FILED
OCT 26 1993
OFFICE OF THE CLERK

No. 93-314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HELEN B. BARNES, M.D.; HENRY THOMAS GUNTER, M.D.; MISSISSIPPI WOMEN'S MEDICAL CLINIC; NEW WOMAN MEDICAL CENTER (JACKSON); NEW WOMAN MEDICAL CENTER (BAY ST. LOUIS),

Petitioners,

v.

THE STATE OF MISSISSIPPI; THE GOVERNOR OF THE STATE OF MISSISSIPPI; THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI; MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE and the members thereof; THE MISSISSIPPI SUPREME COURT and the individual Justices thereto,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Respondents State of Mississippi, et al., respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit. That opinion is reported at 992 F.2d 1335 (5th Cir. 1993). The Court of Appeals held that Mississippi's parental consent to abortion/judicial bypass statute, properly construed

under state law principles, was constitutional on its face under the decisions of this Court.

STATUTES INVOLVED

The text of Mississippi's parental consent to abortion/judicial bypass statute, Miss. Code Ann. § 41-41-51, *et seq.*, is contained in the Appendix to the Petition, 1a-5a, as are the court procedural rules which add detail to the procedure for the bypass established by the statute, Supreme Court Rule 48, App. 9a, and Uniform Chancery Court Rule 10.01, App. 6a. The statute and its proper construction are further discussed in the opinion of the Court of Appeals, App. 21a-23a, 30a-34a, 992 F.2d at 1337, 1341-1342. The parental consent/judicial bypass statute was passed in 1986, subsequent to the decisions of this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) ("Bellotti II") and *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, 490-493 (1983), and its provisions were directly modeled after the guidelines set forth in *Bellotti II*.

Section 41-41-53 requires the consent of both parents to an abortion of an unemancipated minor, with a number of exceptions to allow for one-parent consent. The statute requires only the consent of the parent with primary custody, care, and control of the minor if the parents are divorced or unmarried and living apart, and in all other cases the consent of only one parent will suffice if the other parent is not available in a reasonable time or manner. § 41-41-53(2)(a) and (b). In addition, the consent of the mother will suffice if the minor's pregnancy was the result of incest by the minor's father. Subsection (2)(c). A medical emergency exception to consent is also provided in the statute. § 41-41-57.

The statute contains an integral judicial bypass substitute for parental consent. A minor who elects not to seek parental consent may petition, on her own behalf or by a next friend, the Chancery Court for a waiver of the

parental consent requirement. § 41-41-53(3). The court shall advise the minor that she has a right to court-appointed counsel and shall provide her with counsel upon her request or if she is not adequately represented. § 41-41-55(2).

With regard to the substantive requirements for the bypass proceeding in Chancery Court, § 41-41-55(4) directs that:

> [Parental] consent shall be waived if the court finds either:
>
> (a) That the minor is mature and well-informed enough to make the abortion decision on her own, or
>
> (b) That performance of the abortion would be in the best interests of the minor.[1]

This is identical to the guideline set forth in *Bellotti II*, 443 U.S. at 643-644. The court is required to issue "written and specific factual findings and legal conclusions" regarding its decision under these substantive standards. § 41-41-55(5).

Mississippi's statute further requires that bypass court proceedings be given precedence over other pending matters, that a decision be reached by the Chancellor within 72 hours of the time the petition was filed (or, if not, that consent is automatically waived), and that an expedited appeal shall be available to the Supreme Court. §41-41-55(3). See *Bellotti II, supra.* Similarly, bypass proceedings and any appeal shall be "confidential and

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[1] It is with regard to this substantive provision that Petitioners claimed that a section of the Chancery Court procedural rule conflicted with the statutory "best interests" determination required for a minor who is not mature. Chancery Court Rule 10.01(4) states that a minor may alternatively plead maturity or that "notification of her parents . . . is not in her best interests." The Court of Appeals held that under state law the statute was not preempted by the rule.

anonymous," § 41-41-55(3) and (6), with criminal penalties for unauthorized disclosure, § 41-41-61. See *Bellotti II, supra.*

In this regard, Chancery Court Rule 10.01, App. 6a, regarding bypass procedures, further provides, *inter alia,* that "pleadings, documents, or evidence . . . shall be liberally construed so as to do substantial justice, "that reference to the minor's identity shall be by initials only, and that hearings shall be closed and the confidentiality of all records maintained. Rule 10.01(5). Supreme Court Rule 48, entitled "Appellate Procedure Following Denial of Waiver of Consent to Abortion," App. 9a, provides abbreviated procedures for any appeal and sets forth a precise timetable to ensure an expedited decision by the Supreme Court.[2]

The statute went into effect in July 1993 with the issuance of the mandate of the Court of Appeals, and it is currently in operation.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' JUDGMENT UPHOLDING THE FACIAL CONSTITUTIONALITY OF THE PARENTAL CONSENT/JUDICIAL BYPASS STATUTE IS CORRECT AND WAS CONSISTENT WITH WELL-ESTABLISHED PRECEDENT.

The Court of Appeals' judgment upholding Mississippi's parental consent to abortion/judicial bypass statute as constitutional on its face was a manifestly correct result and an outcome which was required by precedent that is now settled in this particular area of abortion law. The Court has reiterated its views on parental involve-

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[2] Moreover, Uniform Chancery Court Rule 11.00, App. 32a, provides, *inter alia,* that: "If there be any conflict between these [Chancery Court] Rules . . . and any applicable Mississippi statutes, the latter shall be followed."

ment statutes with a judicial bypass alternative in numerous opinions. Accordingly, this case presents no occasion for the exercise of certiorari jurisdiction by the Court.

In holding that a parental consent to abortion statute will be upheld where a sufficient judicial bypass alternative to consent is provided, and, most importantly, that Mississippi's judicial bypass scheme, properly construed under state law principles, was adequate on its face as a matter of law, App. to Pet. for Cert. 23a-25a, 30a-34a; 992 F.2d at 1337-1339, 1341-1342, the Court of Appeals explicitly applied the controlling principles that have been formulated in the decisions of this Court. In at least five cases, this Court has established or expressly reconfirmed the principles which are to be utilized in determining the constitutionality of parental involvement statutes, including two-parent consent statutes, and the proper standards to be followed in assessing the facial sufficiency of a judicial bypass procedure. *Bellotti v. Baird,* 443 U.S. 622, 640-643, 648-649 (1979) ("Bellotti II") (holding with regard to Massachusetts' two-parent consent statute that requiring both parents' consent "does not unduly burden the constitutional right" *so long as* an adequate bypass alternative is available); *id.* at 656 (White, J., dissenting); *Planned Parenthood of Kansas City v. Ashcroft,* 462 U.S. 476, 490-493 & n.15 (1983) (holding that *Bellotti II* set forth "established legal standards" and rejecting the view that *Bellotti II* consisted of non-binding dictum); *Hodgson v. Minnesota,* 497 U.S. 417, 497-499 (1990) (plurality opinion of Kennedy, J.) ("The simple fact is that our decision in Bellotti II stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative"); *id.* at 461 (O'Connor, J., concurring) ("The Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minors' limited right to abortion," citing *Bellotti II*); *Planned Parenthood v. Casey,* —— U.S. ——, 120

L.Ed.2d 674, 729 (Joint Opinion) (summarily approving Pennsylvania's parental consent/judicial bypass statute; "[w]e have been over most of this ground before"); *id.* at 776 (opinion of Rehnquist, C.J.) (same); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 ("Akron II") (reaffirming *Bellotti II* guidelines as the controlling standard for parental involvement statutes and holding that challenged bypass statutes must be construed to harmonize with those constitutional guidelines where fairly possible). Under these precedents, an adequate judicial bypass procedure will clearly save an otherwise unduly burdensome statute, regardless of the precise nature of the parental involvement portion of the statute, that is, regardless of whether it is two-parent notice, one-parent consent, two-parent consent, or some hybrid.

The Court of Appeals properly considered itself bound by these decisions with regard to Mississippi's parental involvement statute, which provides for one-parent consent in a number of circumstances and two-parent consent in others, but which contains an express and integral judical bypass alternative to any parental consent.[3]

Accordingly, as required by *Akron II*, 497 U.S. at 510-515, the question of facial constitutionality ultimately turned upon the narrow and dispositive issue of whether Mississippi's judicial bypass scheme, properly construed, on its face met the *Bellotti II* bypass criteria. These principles are by now familiar. First, a state's judicial bypass will be adequate on its face where it provides a framework in which: (1) a minor may show sufficient maturity to make the decision on her own, or, (2) if immature and not competent to make the decision herself, that the performance of an abortion would be "in her best inter-

[3] The Court of Appeals further held in the alternative that even if *Bellotti* were not binding as precedent, Mississippi's statute passed constitutional muster on its face and was not an undue burden on any abortion right. 26a-30a; 992 F.2d at 1339-1341. The lower court's alternative independent analysis of this question, similarly informed by decisions of this Court, is also correct.

ests;" (3) the bypass procedure is expeditious; and (4) it provides for anonymity and confidentiality. *Ashcroft*, 462 U.S. at 490-493; *Bellotti II*, 443 U.S. at 643-644; *Akron II, supra; Casey* 120 L.Ed.2d at 729 (Joint Opinion) (citing *Bellotti II* and *Akron II*); *id.* at 776 (Rehnquist, C.J.). Second, in construing the judicial bypass, the lower federal courts must be mindful of the general rule that "where fairly possible, courts should construe a statute to *avoid* a danger of constitutionality." *Ashcroft*, 462 U.S. at 493 (emphasis supplied); *Akron II*, 497 U.S. at 514.

As pointed out by the Court of Appeals, Mississippi's judicial bypass statute, Miss. Code Ann. §§ 41-41-51, *et seq.*, App. 1a-5a, adopted in 1986 only after the seminal parental involvement decisions of this Court in *Bellotti II* and *Ashcroft*, was modeled directly after the *Bellotti* criteria and the substantive requirement indeed "tracks [the] language" of that decision,[4] App. 31a, 992 F.2d at 1341. The bypass statute is therefore indisputably constitutional on its face. The only real issue in the Court of Appeals was whether a "semantic difference" between the substantive (and plainly constitutional) requirements of the bypass statute and one allegedly inconsistent section of the supplemental procedural rules, promulgated by the Mississippi Supreme Court for use in the chancery courts, somehow preempted the statute.[5] App. 30a-34a, 992 F.2d at 1341-1342.

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[4] With regard to the substantive requirements for the bypass proceeding in Chancery Court, § 41-41-55(4) directs that "[Parental] consent shall be waived if the court finds either: (a) That the minor is mature and well-informed enough to make the abortion decision on her own; or (b) That performance of the abortion would be in the best interests of the minor."

[5] The Chancery Court pleading rule, § 10.01(4) alternatively permits a minor to plead in the bypass petition either maturity or that one or both of her parents was engaged in abuse against her or that "the notification of her parents . . . otherwise is not in her best interests." App. 61. We note that the language of the chan-

On this narrow issue, the Court of Appeals held as a matter of law that the language of the chancery court procedures did not overrule or preempt the substantive requirement of the statute mandating a "best interests" finding by the chancery court as to immature minors.

This result was plainly consistent with the proper federal approach to statutory construction in such matters [6] and was correct as a matter of state law.

First, under Mississippi law, the state courts are bound to give effect to all *substantive* requirements of a statute; a procedural pleading rule does not "trump" or preempt the statutory "best interests" language, which is a substantive requirement. *Kelly v. Mississippi Valley Gas,*

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cery pleading rule is *identical* to that contained in Ohio's judicial bypass statute, which was construed by this Court in *Akron* II as complying fully with *Bellotti.* See *Akron II*, 497 U.S. at 508, 511. Moreover, if a chancellor after hearing is uncertain as to an immature minor's best interests and may be inclined to deny the petition, the pleading requirement clearly serves a valid informational function. *Bellotti II*, 443 U.S. at 648.

[6] In constitutional litigation, including abortion litigation, the controlling rule set forth by this Court is that "where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Akron II*, 497 U.S. at 514, *quoting Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, 493 (1983). Where no authoritative state court construction of the enactment exists, a federal court may not invent its own reasons to strike down a statute but instead is obligated to give consideration to both the canons of construction used in courts of the state and to plausible interpretations of the law offered by the State Attorney General. *Webster v. Reproductive Health Services*, 492 U.S. 490, 515 (1989); *Frisby v. Schultz*, 487 U.S. 474, 482-483 (1988). Similarly, in a facial attack, a court may not invalidate a statute based upon a speculative "worst case" analysis, and it may not be presumed in advance that a State will construe its law so as to bring it into conflict with the federal Constitution. *Akron II*, *supra*; *Ashcroft*, 462 U.S. at 491 n.16. Moreover, as a matter of state law, courts in Mississippi must similarly adopt a reasonable construction of an enactment which will save it from any potential constitutional problems. *Baker v. State*, 327 So.2d 288, 291 (Miss. 1976).

397 So.2d 874, 877 (Miss. 1981). As pointed out by the Court of Appeals, under a proper construction of Mississippi law, a state court could not, as Petitioners imagined, simply ignore the substantive standards prescribed by the bypass statute. App. 32a; 992 F.2d at 1341. Moreover, as further indicated by the Court of Appeals, "Mississippi's own Chancery Rules direct a court to follow state statutes if there is a direct conflict between the rule and the statute," and the chancery court bypass rules direct that bypass pleadings "shall be liberally construed . . . so as to do substantial justice." *Id.*

This correct construction of state law by the Court of Appeals was dispositive of the appeal below. "Properly interpreted and applied by the chancery courts, Mississippi law requires them to grant any minor a bypass *if an abortion is in her best interest.*" App. 34a note 5, 992 F.2d at 1342 (emphasis in original).

The Court of Appeals followed the decisions of this Court regarding parental consent/judicial bypass measures, and it applied the proper federal and state law rules of statutory construction to the particular enactments at hand. Even if the correction of possible lower court errors were the principal basis for the exercise of certiorari jurisdiction, the judgment below would not be a meritorious candiate for review.

II. THE PETITION SETS FORTH NO GOOD REASONS TO GRANT REVIEW.

A. No Precedent of this Court Requires A "Fact-Finding" Hearing to Determine the Facial Validity of a Judicial Bypass Measure, Which Is A Matter of Statutory Construction.

The Petitioners pose the broad question of whether litigants are entitled to some sort of "evidentiary hearing" with regard to a facial challenge as to some abstract abortion measure, Pet. for Cert. at i, 10-12, and claim that

"[b]ecause the Court of Appeals failed to remand this case for fact-finding under the newly minted undue burden standard, it conflicts with Supreme Court precedent" in *Hodgson* and *Casey, id.* at 12.

The short of the matter is that with regard to the particular type of measure at issue below, a parental consent/judicial bypass statute, no decision of this Court has required "fact finding" to determine the *facial* validity of the court bypass procedure; the issue is one of statutory construction, which is a classic question of law, not of "fact." There is no "conflict" with *Hodgson* or *Casey*, direct or otherwise. To the contrary, both of those decisions, fairly read, confirm the judgment and disposition by the Court of Appeals here.[7]

First, there is no valid purpose or reason for the Petitioners' suggested "fact-finding" remand here. This case involved the facial validity and the statutory construction of judicial bypass enactments in light of Supreme Court and state law guidelines; these are classic issues of law, not questions of fact. There is *no* Supreme Court "precedent" which requires a lower federal court to conduct some sort of speculative "fact-finding" as to the *facial*

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[7] Moreover, because Mississippi's judicial bypass, properly construed, fell squarely within the criteria for a judicial bypass set by *Bellotti* and its progeny, reaffirmed in *Casey*, the Court of Appeals did not directly address the broad and generic issue now sought to be posed by Petitioners. Instead, the Court of Appeals ruled only that a remand for "fact finding" was not required in the context of a determination of the *facial* constitutionality of *abortion statutes essentially identical to those that had received the express approval of this Court.* App. 33a-36a, 992 F.2d at 1342-1343. Accordingly, the relatively narrow grounds of the Court of Appeals' judgment do not constitute an appropriate vehicle to address or to debate the broad and questionable proposition asserted by Petitioners. Indeed, if review were granted, this Court would ordinarily seek to rule on the narrowest ground available and to avoid any unduly broad proposition of constitutional law. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (opinion of Brandeis, J.).

validity of a bypass measure which will be administered by a coordinate state court system. On the contrary, the applicable Supreme Court precedents indicate that a bypass must be upheld where on its face it comports with the *Bellotti II* guidelines. *Akron II*, 497 U.S. at 510-517; *Ashcroft*, 462 U.S. at 491-493. As stated in *Ashcroft*, "[t]he issue . . . is one purely of statutory construction: whether [the State] provides a judicial alternative that is consistent with these established legal standards" set forth in *Bellotti II*. *Ashcroft*, 462 U.S. at 491-492. Statutory construction is a matter of law, not a matter of fact.

Second, the judgment of the Court of Appeals is not even arguably "in conflict" with *Hodgson* or *Casey* as required by this Court's Rule 10.1(c).[8] The purported "conflict" is a product of wishful thinking or a zealous imagination. To the contrary, both decisions upheld as a matter of law the facial validity of parental involvement statutes with an adequate bypass.

The Petitioners' citation at Pet. 10-11 to *Hodgson* for the proposition that some sort of "fact finding" is required is misleading for several reasons. Among other reasons, Minnesota's unique parental involvement statute, unlike Mississippi's, did not contain an *integrated* judicial bypass. Minnesota's preferred scheme was two-parent notice *without* a bypass; it was only if the two-parent notice provision was invalidated by a court that a judicial bypass was triggered. 497 U.S. at 424-427. In this context, the lower court and the Supreme Court assessed the facts concerning two-parent notice in determining whether that type of parental involvement provision *standing alone* was constitutional. In approving Minnesota's scheme *with* the

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[8] It is Respondents' understanding, as stated in Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th ed.), at p. 203, that "to justify a grant of certiorari, the conflict must truly be direct and must be readily apparent from the lower court's rationale or result." Neither that criterion, nor any other Rule 10 standard for the exercise of certiorari jurisdiction, is met with regard to this Petition.

bypass option, however, no "fact finding" was conducted or required as to the validity of the bypass, nor was there any suggestion that the issue was one of "fact" rather than law. *See Hodgson*, 497 U.S. at 497-501 (Kennedy, J.); *id.* at 461 (O'Connor, J.) ("in a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to abortion").

Similarly, there is no arguable reading of this Court's decision in *Casey* as to the facial validity of Pennsylvania's integrated parental consent/judicial bypass statute that suggests that some sort of "fact finding" is required. In affirming by a 7-2 vote the Third Circuit's conclusion that that particular measure was constitutional, this court summarily approved Pennsylvania's bypass statute on its face as a matter of law. *Casey*, 120 L.Ed.2d at 729 (Joint Opinion of Justices O'Connor, Kennedy, and Souter) ("Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided there is an adequate judicial bypass," citing, *inter alia, Bellotti II* and *Akron II*); *id.* at 776 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[P]ennsylvania's parental consent/judicial bypass provision is entirely consistent with this Court's previous decisions involving parental consent requirements"). The suggestion of Petitioners that Pennsylvania's parental consent/bypass provision was somehow remanded by the Court in *Casey* for further fact-finding, Pet. at 12, is absolutely ludicrous.

There is no "conflict" and no warrant whatsoever for review by this Court.

B. The Decisions of This Court in Bellotti II and its Progeny Plainly Establish that An Adequate Judicial Bypass Will Save An Otherwise Burdensome Parental Involvement Statute.

The Petitioners claim that the constitutionality of "two-parent" consent statute with a bypass "has never been, and should be, addressed by this Court." Pet. at 13-16. They assert that "[t]he Court in Bellotti II. . . did not discuss whether an adequate bypass provision would be sufficient to rectify the constitutional problems associated with a two-parent consent requirement" and that the question is "open." Pet. at 13 note 9.

The Petitioners' premise is demonstrably incorrect and, in light of numerous decisions of the Court, cannot form a valid basis for the exercise of certiorari jurisdiction to review the judgment below. Under the principles which inform the use of *stare decisis*, see *Casey*, 120 L.Ed.2d at 706, it is far too late in the day for the Petitioners to seek to ignore *Bellotti II* or to dismiss it as dictum.

The requirements for a sufficient judicial bypass, and the principle that a bypass alternative would save a parental consent statute that unconstitutionally burdens an abortion right, were expressly formulated by the Court in *Bellotti II* in the context of Massachusetts' "two-parent" [9] consent statute. Those principles have been utilized, and *Bellotti* has been cited, in all subsequent Supreme Court parental involvement decisions. In *Bellotti II*, the four-Member plurality opinion of Justice Powell expressly held that:

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[9] Massachusetts' two-parent consent statute at issue in *Bellotti II* required the consent of both parents with few exceptions. 443 U.S. at 630. By contrast, the parental involvement portion of Mississippi's consent/bypass statute permits a number of exceptions to allow for one-parent consent where the parents are divorced, where only one parent is available in a reasonable time, or where the pregnancy was caused by sexual intercourse with the minor's father or stepfather.

> [w]e are not persuaded that, as a general rule, the requirement of obtaining *both parents' consent* unconstitutionally burdens a minor's right to seek an abortion. The abortion decision has implications far broader than those associated with most other kinds of medical treatment.
>
> * * * *
>
> As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation, or consent, the general rule does not unduly burden the constitutional right.

Bellotti II, 443 U.S. at 649 (emphasis supplied). Adding Justice White's vote in dissent, this represented the reasoned majority judgment of the Court, since the Court was expressly addressing the District Court's objection to the consent of both parents. *Id.* at 648.[10]

Subsequently, in *Ashcroft*, the Court expressly held that the plurality opinion in *Bellotti II*, with Justice White's dissent, had established the controlling legal standards and specifically rejected the claim of the dissenters that the law regarding parental consent requirements was an "open" question. *Ashcroft*, 462 U.S. at 490 n. 15. See also *Akron II, supra.* More recently, Justice Kennedy in *Hodgson* spoke to this issue at some length:

> The simple fact is that our decision in Bellotti II stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient bypass alternative. . . .
>
> * * * *
>
> The plurality's considered reasoning [in Bellotti] coupled with the dissenting views of Justice White,

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[10] In addition to the decisions of this Court reaffirming *Bellotti II*, the First Circuit subsequently upheld Massachusetts' amended two-parent consent/judicial bypass statute as constitutional on its face, on the basis of this Court's decision in *Bellotti II*. *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1012-1013 (1st Cir. 1981).

> was intended to set forth dispositive principles of law for deciding the constitutionality of parental consent laws.

497 U.S. at 498-499 (opinion of Kennedy, J.); *see also* 497 U.S. at 461 (O'Connor, J).

Respondents submit that the Petitioners' less-than-candid discussion presents no good reason to revisit this now-settled subset of abortion law. The only "open" question regarding parental involvement statutes is whether a one-parent notice statute *without* bypass is constitutional, see *Akron II*, 497 U.S. at 510, but the judgment of the Court of Appeals regarding Mississippi's statute obviously does not and could not present that question. Given the facially valid judicial bypass, further review of the judgment below would serve no purpose.

C. The Court of Appeals' Judgment Is Not in Conflict with the Ninth Circuit, But Instead Turned On a Construction of State Law Which Is Inappropriate For Review.

Finally, the Petitioners' claim, Pet. at 16-17, that the Court of Appeals' decision upholding Mississippi's judicial bypass conflicts with the Ninth Circuit's decision in *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), invalidating Nevada's bypass statute.

There is no "conflict" with *Glick*, direct or otherwise, of the type appropriate for review by this Court. The two states have different statutes. Mississippi's bypass statute, which sets forth the substantive standards for the chancery judges to apply, expressly incorporates the "best interests" language directly from *Bellotti II*; Nevada's statute did not use the *Bellotti* language, but instead used *only* language that a bypass would be permitted if "notice . . . would be detrimental to [the minor's] best interests," 937 F.2d at 442. Accordingly, Nevada's statute

addressed by the Ninth Circuit, correctly or incorrectly, is clearly distinguishable from the question addressed by the court below. As the Court of Appeals correctly held, since Mississippi's bypass statute uses language identical to that approved in *Bellotti,* the only real question was whether under state law the statute was totally preempted by an allegedly inconsistent procedural rule of court. App. 30a-33a, 992 F.2d at 1341-1342. As a matter of Mississippi law, the Court of Appeals found that it was not.

Accordingly, the judgment below turned on a construction of state law. There is no direct conflict with *Glick,* and matters involving the construction of state law have been held to be particularly inappropriate for review by this Court. *Haring v. Prosise,* 462 U.S. 306, 314 n.8 (1983) ("a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject for this Court's review [under] this Court's Rule [10]"); *Bowen v. Massachusetts,* 487 U.S. 879, 908 (1988) ("we have a settled and firm policy of deferring to regional courts of appeal in matters that involve the construction of state law"). Accordingly, this proposed issue does not warrant review by this Court.

CONCLUSION

The Court has indeed "been over most of this ground before," with respect to parental involvement statutes, *Casey,* 120 L.Ed.2d at 729 (Joint Opinion), and Respondents submit there is no need to do so again. The judgment of the Court of Appeals expressly relied upon, and was plainly consistent with, the decisions of this Court. There is no conflict with any precedent of this Court nor with the decision of any other court of appeals. Instead, the decision below ultimately turned on a construction of state law, a narrow issue which is particularly inappropriate for review by this Court. Accordingly, for

the reasons set forth in this brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 26, 1993.